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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

October Term, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

*Petitioners,*

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

*Respondents.*

# Supplemental Brief of the City of Milwaukee, The Sewerage Commission of the City of Milwaukee, and The Metropolitan Sewerage Commission of the County of Milwaukee in Response to the Memorandum for the United States as Amicus Curiae

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## INTRODUCTION

This supplemental brief is filed pursuant to Rules 24(5) and 42 of the Rules of the Supreme Court of the United States, and presents the response of petitioners City of Milwaukee, The Sewerage Commission of the City of Milwaukee, and The Metropolitan Sewerage Commission of the County of Milwaukee (collectively, "Milwaukee") to the new, intervening material presented by the Memorandum for the United States as Amicus Curiae with respect to Case No. 79-408.[1]

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[1] Petitioners in Case No. 79-408 are respondents in Case No. 79-571. For the reasons described in Milwaukee's Brief in Opposition to the Petition for Writ of Certiorari filed by the State of Illinois in Case No. 79-571, we agree with the United States that the Court should deny Illinois' petition.

## QUESTIONS PRESENTED

Milwaukee respectfully refers the Court to the Questions Presented set out in the Petition for a Writ of Certiorari filed in Case No. 79-408.

## STATEMENT OF THE CASE

Milwaukee respectfully refers the Court to the Statement of the Case set out in the Petition for a Writ of Certiorari filed in Case No. 79-408.

## ARGUMENT

As stated above, this is in response to the "Memorandum *for* the United States as Amicus Curiae." (emphasis added)

The almost cryptic memorandum filed for the United States tells this Court that the expenditure of the Court's time is not warranted in this case: a case that involves millions of the people of the United States; a case that involves the expenditure of billions of United States and local tax dollars; a case that directly involves, if not the largest local public works project in this country's history, then one of the largest, and establishes the law for like projects to follow; a case decided after the enactment of applicable comprehensive statutory and regulatory provisions which enactment followed the eight-year old decision of *this Court* establishing the basis for this case, which decision of this Court specifically recognized both that this Court's holding was made in the absence of legislation and that the federal common law was subject to displacement by subsequent federal legislation and regulation; a case where liability was imposed by a single federal district judge who admitted his inability to grasp the difficult subject matter but nevertheless imposed liability in the absence of *any* empirical evidence of harm and imposed a remedy without permitting proof of the costs or cost effectiveness thereof; and a case where the Court of Appeals affirmed on the basis that the defendants had failed to prove the very facts that the District Court had not allowed the defendants an opportunity to prove!

Have we really reached the point in this country when this Court should heed the opinion of the executive, as expressed by its attorney, not even its agency charged with environmental concerns or its office of management and budget, that the plea of millions of people being required to expend billions of dollars does not warrant the time of this Court? Note the position of the executive, through its attorney, is a restatement of the identical position before the Court of Appeals taken by Mr. Moorman, the former executive director of the Sierra Club Legal Defense Fund, lead counsel for the United States in the Court of Appeals, and the second ranking attorney for the United States here. The people deserve better treatment from the sovereign — more than the back of its hand administered in the form of a memorandum obviously influenced by an apparent advocate for a position. Milwaukee submits that this case does not merely warrant this Court's attention; the facts of this case make a most eloquent plea for that attention.

Why does the amicus "for the United States" seek to avoid review in the face of the acknowledgement that the issue presented in this case "is not inappropriate for consideration here"? (U.S. Memo. p. 3) Why does the amicus seek to avoid review even as to issues on which the amicus expresses no opinion? (U.S. Memo. p. 7) Of course, politically appointed public officials inherently bring positions on political issues to their job, but they should not be permitted to either use a public office or give the appearance of so doing to discourage review by this Court, sought by and important to the public at large, because they, as individuals, agree with the decision below.

The millions of people of the United States and their billions of dollars are, we believe, more faithfully represented in seeking review by the amicus briefs previously filed for all the major cities and sewer districts in the United States. Continued respect for the law by the public at large is best served through review by the highest authority of a far reaching mandate which imposes perhaps the most economically severe remedy ever imposed by a court. Truer still is this proposition when the mandate operates in a new area of law and is based on conflicting opinions of "experts" only, with absolutely no empirical

evidence of harm. This is not the stuff to cause a common law court in the exercise of nuisance jurisdiction to require so many citizens to reach so deeply into their tax coffers.

In reaching its virtually *ipse dixit* conclusion that the Milwaukee petition for certiorari may appropriately be denied[2], the Memorandum for the United States restates, in strawman form with the hobgoblin label of preemption, *one* of the arguments of the Milwaukee petitioners, then knocks that strawman down and ignores the balance and real substance of the Milwaukee petition.

In the only point it discusses, the Memorandum of the United States asserts that the whole issue as urged by the Milwaukee petitioners is one of total preemption of federal common law by federal legislation. Even a cursory reading of the Milwaukee petition belies that contention. True, the Milwaukee petitioners do set out, as the fact is, that the Congress of the United States has enacted and the Environmental Protection Agency of the United States has adopted pursuant to the Congressional enactment, an overall approach to point source discharges to navigable and interstate waters, which statutes and regulations are a comprehensive scheme for control of discharges that must at the very least guide the courts in applying the federal common law of nuisance to discharges to navigable and interstate waters. To that extent, the position of petitioners resembles a preemption argument. However, central to the Congressional enactment and the regulations adopted thereunder and the common law of nuisance, is the concept that costs and cost effective solutions are of major and even paramount importance to relief regardless of preemption. The statute recognizes costs and cost effective solutions because of the tremendous sums that are involved in these areas and the at-

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[2] As noted above, (footnote 1), we agree that the Illinois petition would appropriately be denied. We presume the United States joins in the reasons expressed in our response to the Illinois petition as the United States does not state the basis for its recommendation in this respect.

tendant resource allocation which must be considered. The common law has always recognized the same issue for particularized application under its doctrines of balancing equities. The District Court and the Court of Appeals specifically ignored costs and cost effective analyses regardless of statute, regulation or common law doctrines.

The Court of Appeals, in affirming the District Court, compounded the error. It first commented that it did not have costs and cost effective information before it on which to consider the position of the District Court, thus totally ignoring the fact that the District Court would not permit that type of evidence to be placed before the court. But of equal importance is the internal inconsistency of the Court of Appeals' positions. On the matter of effluent limitations the Court of Appeals found a lack of evidence and upon that finding held that the lack of proof must result in a denial of relief to the plaintiff. This is, of course, the proper application of the law. The plaintiff failed in its proof, so relief was denied. On the matter of costs and cost effectiveness of relief granted as to overflows, however, the Court of Appeals inverted the burden. Though a nuisance plaintiff is required to prove its right to relief and a comparison of harm to itself against relief imposed which balances in plaintiff's favor as an element of that proof, the Court of Appeals held rather that the absence of such evidence justified the relief accorded to plaintiff.

The entire line of inquiry and policy relating to costs and cost effective remedies, having political ramifications to the United States as a whole and being the subject of Congressional debate and enactment, as well as the proof inversion of the Court of Appeals, has been brushed aside in the Memorandum for the United States by characterizing petitioners' position as being an argument for total preemption. In fact, the District Court refused to follow the political determination by Congress as to the allocation of the nation's resources. The Court of Appeals affirmed that determination because evidence in respect thereof was not present. The Court of Appeals thereby ignored the Congress, common law doctrines and the fact that the

District Court itself caused the lack of that very evidence by refusing to accept it.

In short, as is demonstrated above and in the remaining portions of this response, the Memorandum for the United States fails to recognize the gravity and importance of this case, mischaracterizes the arguments of the petition and phrases them in terms of a pure preemption argument, concludes that the issue of preemption as posed by the Memorandum for the United States was correctly decided below, states that there are no further issues in the case even though issues of *stare decisis*, jurisdiction and venue are all presented and even though recognizing that at least one of the questions presented is "not inappropriate for consideration here" and finally suggests that the petitions for certiorari may appropriately be denied.

The executive arm of the federal government would thus like to displace this Court by saying that the one issue its Memorandum raises and discusses was correctly decided below and therefore no review is warranted. Such position is tantamount to the *executive* determining that the lower federal courts, acting under the federal common law of nuisance, are free to and should totally disregard Congressional enactments, regulations and basic common law doctrines. It is in this vein that the Memorandum for the United States at page 3 states:

> "3. The City's petition presents, *inter alia,* the issue of preemption left open by the court in *Illinois v. Milwaukee, supra.* While that question is not inappropriate for consideration here, *we believe it was correctly decided by the Court of Appeals and,* in the absence of any conflict, we cannot conclude that further review is warranted." (emphasis added)

In essence, the executive would now first determine whether or not correct decisions were made by the Court of Appeals. Based on such determination, the position of the United States as to whether or not this Court should review decisions would be

made. Certainly the appellate judicial function of this Court should not depend on a prereview as to the correctness of decisions on issues below by the executive or on the failure of the executive to express its opinion as to the correctness of other decisions on issues.

After making its single presentation of a created strawman argument, the Memorandum for the United States at page 7 states concerning all "remaining issues":

> "These are matters as to which the United States expressed no opinion in the court of appeals and it seems inappropriate to do so here."

Thus does the United States ignore the jurisdictional and venue issues as well as the numerous other issues raised in the Milwaukee petition. For example, the courts below failed to follow the controlling precedents of this Court in respect of relying on conflicting expert testimony in the absence of demonstrative or empirical evidence, the rule being that conflicting expert witness testimony in such a situation is not sufficient to accord relief in an action alleging an interstate nuisance. (Milwaukee Pet. pp. 33-38.) As to the "remaining issues" not reviewed by the United States, petitioners also rely on their petition.

In the two areas where the Memorandum for the United States argues the authorities for the legal position espoused on the sole issue it discusses, the Memorandum misses the mark.

First, in arguing its manufactured preemption position, the Memorandum relies on the legislative history to show that Congress preserved the federal common law existing before the Clean Water Act (33 U.S.C. §1251). The Memorandum fails to note that the legislative history quoted at footnote 3 on page 4 and 5 was embodied in Senate and House reports made *before* this Court established the existence and applicability of the federal common law to interstate water pollution in *Illinois v.*

*Milwaukee,* 406 U.S. 91 (1972). The Memorandum then states at page 5 that the Clean Water Act only establishes a baseline of controls and that:

> "The *states* are expressly authorized by Section 510 of the Act, 33 U.S.C. 1350, to adopt and enforce still more stringent controls. (footnote omitted) The *states* also are given primary responsibility for adoption of water quality standards under Section 303 of the Act, 33 U.S.C. 1313." (emphasis added)

This is followed by completing the non sequitur with the conclusion:

> "This, as the court of appeals held (Pet. App. A-17 to A-18), leaves open a continuing role to be played by the *federal* common law of nuisance, not inconsistent with the Clean Water Act." (footnote omitted) (emphasis added)

Thus, the Memorandum relies on legislative history made when the *federal* common law had not yet been established by this Court, and couples that with statutory references to *state* power in an attempt to validate the use below of *federal* common law without regard to *federal* statute.

In the second instance of arguing the authorities, the Memorandum for the United States makes its argument in footnote 5 on page 6. The position taken is that other federal courts have uniformly concluded that the federal common law survives the enactment of the 1972 Amendments "at least as to interstate pollution." At page 7 of our reply brief herein, we reflect the fact that all except two of the cases cited in footnote 5 *did not reach the question* of the effect of the statutes and regulations on the federal common law. The two cases cited at footnote 5 and not discussed at page 7 of our reply brief are *California Tahoe Regional Planning Agcy. v. Jennings,* 594 F.2d 181, 193

(9th Cir. 1979), cert. denied, ____ U.S. ____ (No. 79-15, Oct. 1, 1979), which case was dismissed for failure to state a claim though it did peripherally and without analysis rely on the other cases cited at footnote 5 for the possible existence of a federal common law claim if properly pleaded, and *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975) which case merely cited the Clean Water Act but relied on the Rivers and Harbors Appropriation Act of 1899 (33 U.S.C. §401 et seq.) for its holding.

Certainly these two instances of legal analysis in the Memorandum of the United States are no predicate for a conclusion as to whether this Court should or should not grant review.

We submit that the number of people affected, the dollar commitments involved, the uncertainty of the law, the opportunity for vast amounts of litigation in the area and the overall importance of the subject — interstate relationships to interstate environments and natural resources — clearly warrant the exercise of this Court's appellate review.

## CONCLUSION

Milwaukee respectfully prays that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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